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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-713

VIRGINIA IMPRESSION PRODUCTS CO., INC.,

Petitioner,

vs.

SCM CORPORATION,

Respondent.

Reply Brief to Opposition to Petition for Writ of Certiorari

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SCM has carefully avoided responding to the merits of VIP's petition. Rather, it indulges in irrelevancies. For example, it argues innocence of antitrust violations although this issue is not before the Court; it spuriously suggests that VIP has attacked the integrity of attorney George Freeman of the Richmond law firm of Hunton, Williams, Gay, Powell and Gibson; and it erroneously asserts that the important federal questions raised by VIP's petition are contrived afterthoughts.

Speaking to the real issue, SCM urges that the issues posited by VIP's petition are not supported by the record. Precisely the contrary is true. Not only are the issues urged by VIP properly raised by the records and of pervasive importance to the fabric and policy of the antitrust laws but, moreover, SCM's failure

to challenge the undisputed facts dealing with the *real* intention of the parties (conceding as it does that VIP neither knew of nor intended to release its antitrust claims)[1] establishes the fallacy of SCM's assertion that application of the rule urged by VIP would not bring about a result ". . . any different from that reached by the court below."

I. The Issues Framed in the Petition Are Raised by the Record.

On the relevant issue, SCM's argument is this: while the intent of the parties is the determinative factor in ascertaining the scope of a release, that intent may only be determined by recourse to the four corners of the document. Thus SCM pays lip service to *Zenith* and to underlying federal policy while at the same time invoking 19th century parol evidence rules which would prevent consideration by the court or jury of the circumstances surrounding and leading up to the execution of the release or consideration of the parties' testimony as to what they truly intended. SCM is forced to take this anachronistic stand, since otherwise it cannot support the decision of the court below, which, in limiting itself to the four corners of the agreement, gave to the agreement a meaning contrary to the actual intent of the parties as demonstrated by the evidence and found by the jury under an instruction in which the specific issue framed was whether the *parties* intended to release the antitrust claims.[1a]

In all of its lengthy factual recital, SCM never denies the operative facts on which this general release was based:

(1) VIP did not intend to release any antitrust claim. SCM concedes this.[2]

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1. See footnote 2 and 3, infra.

1a. This instruction is set out in Appendix A to the brief.

2. "Redman, acting for VIP, said that he thought the release covered only the account dispute. (613a) This must be accepted as true for the purposes of this appeal." SCM Reply Brief in the Court of Appeals, p. 2.

(2) VIP did not know it had an antitrust claim. SCM concedes this.[3]

(3) In all the negotiations prior to the preparation of a draft agreement by SCM's counsel, all parties to the negotiations understood that they were settling the disputed commercial account items—and only those items—outstanding at the time of VIP's termination as an SCM dealer.[4]

(4) VIP could not have known it had an antitrust claim, since, as pointed out by the dissent in the court below, the most material fact which would give rise to that claim—the reason for its termination—was consciously concealed from VIP.[5] Even SCM admits that the only persons that knew of the possible antitrust claims were SCM's house counsel and SCM's drafting counsel.[6]

(5) House counsel in this context actively instructed its drafting counsel "not to specify the claims being released."[7]

In limiting itself to the four corners of the Agreement (from which it divined the intent of the parties) the majority of the court

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3. "From the record, and despite possible inferences to the contrary, it must be admitted for the purposes of this appeal that VIP has shown that it did not know of its potential antitrust claim against SCM when Redman executed the Settlement Agreement." SGM Reply Brief in the Court of Appeals, p. 2.

4. The factual background of the Settlement Agreement is summarized in Appendix B.

5. Contrary to the majority opinion below the reason for VIP's termination was both unknown by and misstated to VIP. Paragraph 10 of the dealer agreement provided for ten-day termination on written notice by either party. SCM's April 8, 1964 termination letter purported to terminate pursuant to Paragraph 10. (DX 1101, 54a) When Ruch directed SCM's Area Manager, Lett, to deliver the termination letter to VIP, Lett asked but was given no reason for the termination. (331a, 332a) This refusal was pursuant to SCM's policy not to give reasons for dealer terminations 1086a) Similarly, when Lett delivered the termination letter, he was asked the reason for termination. (333a, 602a) Lett would not say. (333a, 602a) Redman believed that VIP was terminating him pursuant to Paragraph 10. (626a, 628a, 629a)

6. SCM Reply Brief in the Court of Appeals, p. 3.

7. Freeman 1291a.

below disregarded all of the above facts, even though they clearly showed an intent different from that which the majority drew from the Agreement alone.

If, as VIP contends, the rule is that a party can only be held to have released those claims which he intended to release, the jury's decision must be affirmed.

As the dissenting judge below observed:

> "If I am correct that the jury was correctly permitted to consider the evidence of the intention of the parties, there is an ample record from which the jury could conclude that there was no mutual intention to release VIP's alleged antitrust claims."[8]

In an attempt to obscure the real issue, SCM falsely accuses VIP of launching a personal attack on Mr. Freeman. VIP has never questioned and does not now question Mr. Freeman's ethics or integrity in carrying out his clients' instructions. Rather what VIP complains of is SCM's concealment from VIP of the reasons for its termination; its concealment of possible antitrust violations from VIP during the negotiations carried on to settle outstanding commercial accounts; and its subsequent instructions to Mr. Freeman that in preparing an agreement reducing the settlement of these commercial accounts to writing he should include general release language without mentioning antitrust claims. The trial court noted that SCM's conduct was subject to question when it observed in chambers that:

> "a beautiful argument could be made that they [SCM] led this man [VIP's president] down the primrose path" by leading him to believe only the commercial accounts were being settled and later "slip[ping] that general release in on them. . . ." (RA Vol. XXXIX, 9)

II. The Release as Construed by the Court of Appeals Barred Post Release Antitrust Violations.

SCM now says that there is no issue of whether a release can bar a claim for damages caused by antitrust violations

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8. P.App. 14-15.

occurring after the release was signed, because of "failure of proof" and "express abandonment". The issues were raised and briefed in the Court of Appeals by both sides. They were not passed on by the Court of Appeals.

Despite the concession by SCM that the complaint alleges a post release claim and that the release did not cover post release claims,[8a] the Court of Appeals held:

> "Because we conclude that, as a matter of law, the settlement agreement expresses the intent of the parties to grant mutual general releases, the verdict rendered below will be vacated, and the complaint dismissed." (P.App. 8)

The majority thought SCM's position to be contrary to what SCM asserts here.

> "SCM posed a general settlement agreement between the parties as a defense, urging that it effectively released anti-trust claims as well as all others, and that VIP was barred from bringing the present action. We agree." (P.App. 1-2)

The Court of Appeals held that this release "as a matter of law" required the dismissal of the complaint including those allegations of post release violations.

III. The Issues Before This Court Were Raised at Trial and on Appeal.

SCM's argument that the contentions raised in VIP's Petition for Certiorari were raised for the first time in its petition for rehearing is not supported by the record.

The precise issue was first raised in a charge to the jury requested by plaintiff and given by the trial court which instructed the jury that the scope of a purported release must be determined by the intent of the parties after consideration of all of the evidence, and that a party cannot be held to release claims he did not intend to release.[9]

8a. Respondent's Brief in opposition, p. 2 and p. 5.

9. The instruction as given is presented at Appendix A to this brief.

Moreover, the issue of how a purported release of federal antitrust claims is to be construed was again raised in oral argument before the court below.[10] Within a week after the oral argument, and before decision by the court below, counsel for VIP by letter brought the then unpublished and recently decided decision in *Zenith Radio Corp. v. Hazeltine Research Inc.* to the lower court's attention as support for its contention. SCM responded by letter denying that *Zenith* had any applicability.

VIP urged the same position in its petition for rehearing, and has repeated its arguments in its petition to this Court.

IV. The Issues Presented Here Have Impact Beyond the Instant Case.

Contrary to SCM's assertion, the decision below has a far reaching impact on the private enforcement of the antitrust laws. It leaves unclear the question of whether every release interposed as a defense to federal antitrust claims is subject to the vagaries of state parol evidence rules. It would allow large and sophisticated companies to insulate themselves from liability for antitrust violations by extracting from their victims general releases of unknown antitrust claims under the pretext of settling commercial accounts. It undermines the federal policy encouraging private enforcement of the antitrust laws by allowing the release, not only of unknown antitrust claims, but of claims which could not have been known because the operative facts giving rise to the claim were concealed from the injured party. And it

10. There the senior judge on the panel asked counsel for VIP whether there was authority for treating the release of federal antitrust claims differently or whether antitrust claims could be released just as other claims. Counsel replied that although he knew of no specific authority, with respect to federal antitrust claims, it was VIP's contention that in view of the strong federal policy underlying private enforcement of the antitrust laws, there should be a rule that a party can be held to release only those claims which he intended to release.

holds that a general release can insulate a company from liability for *future* violations of the antitrust laws.

V. Conclusion.

For the foregoing reasons the petition for writ of certiorari should be granted.

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(Appendices Follow)

Appendix A

Charge to the Jury

Now, the document, dated September 15, 1964, is entitled "Settlement Agreement" and is signed by the officers of Virginia Impression Products and SCM.

Now, a purpose of the document, you will note from it as stated in its preamble, is to settle certain differences in regard to and growing out of the termination of Virginia Impression Products as an SCM photocopy dealer. There is a dispute, however, as to what "certain differences" the parties intended would be settled by the agreement.

SCM contends that the agreement was intended by the parties to settle a potential antitrust claim, such as this one. In other words, a general release to settle all claims, known or unknown.

Virginia Impression Products on the other hand contends that at the time it executed the agreement it didn't know of the existence of any antitrust claims and did not intend (55) that the agreement would settle any potential antitrust claims. Virginia Impression Products contends that the phrase "certain differences" that were to be settled by this agreement extended only to accounts owing SCM, unfulfilled orders placed by Virginia Impression Products, Virginia Impression Products' claims to discounts and commissions, and the matters of returning goods to SCM.

Now, I have allowed both parties to introduce evidence bearing on the meaning of the agreement so that you might determine. And it will be for you, the jury, to interpret the agreement by deciding what differences it was intended to settle.

Your primary job in this respect will be to ascertain the intent of the parties. To assist you I have allowed the parties to introduce evidence of their intent, including evidence as to the state of mind of the persons who were responsible for the negotiations and drafting of the agreement, as well as evidence of the cir-

cumstances surrounding its negotiations and drafting. You may consider all of this evidence in reaching your decision. The question for you to answer is this: Did Virginia Impression Products and SCM intend that the settlement agreement was to resolve, that the settlement agreement was to resolve, SCM's possible violations (56) of the antitrust laws? Now, unless you find that the parties intended by this agreement to include the release of antitrust claims against SCM you must find for the plaintiff, Virginia Impression Products, on this issue. And therefore you can put away the release and not have it affect you. Just because somebody doesn't know something doesn't mean you can't release it. You can release it if you intend to release everything. But if you intend to just release one thing, and that is for you to determine, what the intent of the parties were, both parties. (83a, 84a)

Appendix B

The negotiations were conducted in two stages. The first stage involved negotiations between VIP's president and certain SCM personnel and was concerned only with outstanding orders and accounts. After agreement was reached, SCM engaged local counsel to prepare a written agreement.

The following summary of the events preceding the preparation of the Agreement is offered to give the Court a better understanding of the factual context in which the Agreement was executed.

VIP was terminated effective April 20, 1964. (PX 1197) There followed a period of sporadic efforts by the parties to reconcile the amount actually owed SCM by VIP for past purchases of machines and supplies. SCM was demanding $34,464.00 (DX 1125) but VIP was asserting substantial credits.

From the very outset, "settlement" as used by the parties referred to, and only to, reconciliation of the account. On July 17, 1964, Kessler, SCM's credit manager, urged VIP to advise him "by return mail when we may expect settlement." (DX 1132) (emphasis added) Thereafter, on July 20, 1964, Redman wrote to Kessler as follows:

> Dear Mr. Kessler:
>
> It has been extremely burdensome to us and we know to you to reconcile our figures with yours in order to arrive at a final settlement.
>
> The attached facts are to be settled as you can see. If a sincere effort is made by SCM to correct our attached differences or a basis of adjustment is made, we will be most happy to cooperate as we wish to settle the matter as quickly as possible without taking legal action against one another. I am sure that you do not wish to attempt a settlement if it is wrong.

"We only wish to have each attached item resolved to mutual satisfaction. When this is accomplished we will arrange full settlement.

Sincerely,
Donald H. Redman, President
VIRGINIA IMPRESSION PRODUCTS., CO., INC.
(PX 1237)

Transmitted with the letter were summary sheets setting forth the "attached differences" (PX 1237) which hopefully could be "resolved to mutual satisfaction". The sheets were entitled "SCM Questionable Items" (listing disputed commission credits, disallowed discounts and other disputed accounting items); "Equipment and Supplies to be Returned to SCM", (listing various non-saleable merchandise on which VIP demanded a returned-goods credit), and "Other Matters to Be Settled With SCM" (consisting of five numbered items, principally relating to unfulfilled orders placed by VIP prior to its termination). (PX 1237)

Thus as of July 20, 1964, VIP was asserting the following deductions from SCM's claimed balance owing (copied verbatim from PX. 1237):

	Total both pages
	34,464.09
	14,213.73
Settlement	20,250.36

Plus parts to be replaced
No charge to VIPCO, Inc.

On July 23, 1964, Lett and William Noone, SCM's Regional Office Manager for the Eastern Zone (Noone, 731a), met with Redman in Richmond. (PX 1241) The purpose of their trip to Richmond was to "see if we couldn't settle whatever had to be settled". (Noone, 742a) (emphasis added) The product of these negotiations is set forth in detail in a memorandum written the same day by Noone to Kessler. (PX 1241)

The testimony at trial with reference to the settlement was as follows:

Joseph Lett:

Q. All right. Now, generally, sir, why were you and Mr. Noone meeting with Mr. Redman on that day? A. We went to settle the account on both sides of the fence, to make sure that Mr. Redman got what was due him and that SCM corporation got what was due us. (Lett, 340a) (emphasis added)

William Noone:

Q. When you went to Virginia Impressions what were your duties? What was your understanding of your instructions as to what you were to do when you got to Virginia Impressions? A. To see if we couldn't settle some of the disputed items that were open on the account. (Noone, 1186a) (emphasis added)

Q. And . . . (then) they told you to go down to Virginia Impression Products and clear up some discrepancies in the account, is that correct, sir? A. Yes, sir.

Q. Prior to the time they told you to do this nobody told you why Virginia Impression Products had been terminated? A. No, sir.

Q. And you never told Virginia Impression Products or anyone who worked there why they had been terminated, did you, sir? A. Not that I know, sir.

Q. You were down there to settle whatever had to be settled, right? (1097) A. That's right.

Q. Any by settling you mean settling the account and matters that related to the accounts?

A. Settling the dispute and concerning open items, right. (Boone, 1192a) (emphasis added)

Donald Redman:

Q. Mr. Redman, at the time you signed the agreement of September 11, 1964, did you understand that you were doing anything other than settling the account? A. No. (Redman 613a)

The Witness: My understanding was that it (the Settlement Agreement) formalized the settlement that I made with Mr. Noone in July of 1964. It was just to me a routine document settling all of our financial—certain differences that we had.

The Court: Are you saying that it set out the understanding you had with Mr. Noone? Is that what you are saying?

Witness: Yes, Your Honor.

The Court: All right.

The Witness: As far as I am concerned I settled with Mr. Noone. (Redman 614a)

Only Sexton, an SCM lawyer, expressed at trial his previously unexpressed intent, to settle an antitrust claim with Redman, a man he never met. (Sexton 1263a) It was Mr. Sexton who instructed Mr. Freeman, the lawyer he hired to formalize the agreement reached by Lett and Noone, "not to specify the claims being released," (Freeman, 1291a) Freeman obeyed Sexton's instructions and made no mention of any possible antitrust or unfair competition claim.[1] Finally, Sexton admitted that he did not know of any SCM employee who talked to Mr. Redman about antitrust claims. (Sexton 1264a).

Thus, the documentary evidence and testimony at trial is clear and consistent (excepting only Sexton's later conceived but secret intent) that nothing changed[2] between final negotiations

1. Freeman, 1290-91a.

2. As far as SCM's Regional Office Manager was concerned, after July 31, 1964, the date on which his memorandum to Kessler transmitted VIP's check in the amount of $9,157.39 and eight notes totalling $16,000.00 which had been submitted by VIP "in final settlement of the balance due", (PX 1242) as agreed upon during the July 23, 1964 meeting, it was merely a "collection matter" (Noone 1191a) Thus, as of July 31, 1964, SCM's demand of $34,464.09 (DX 1125) and VIP's offer of $20,250.36 (PX 1237) had been reconciled at $25,157.39. (PX 1242) SCM had their money in hand in the form of checks and notes and nothing remained to be solved except for the fact that Redman refused to pay interest on the eight notes (PX 1242), a matter which was beyond Noone's authority to resolve:

QUESTION (to Mr. Noone): Referring to this date of July 31, 1964, is it fair to state that you had resolved everything but the interest question with Mr. Redmond? ANSWER: Yes (746a). Noone had informed Redmond that if his refusal to pay interest on the notes was not acceptable the notes would be returned, but the matter was "resolved in a conversation between myself (Kessler) and Mr. Sexton" (752a) and so it was not necessary to return them. From then on, it was merely a matter of formalization through Mr. Freeman who, as stated above, conceded that he never mentioned antitrust to Mr. Redman.

between Redman and the fiscal people on July 31, 1964 and the formalization in writing on September 15, 1964. Moreover, Freeman conceded at trial that Sexton had told him that "he [Sexton] had approved a settlement worked out by the fiscal people at Virginia Impression Products". (Freeman 1290a)

In fact, after the Settlement Agreement had been signed, Sexton wrote to Kessler on September 30, 1964, and pointed out the obvious:

> You will note that the settlement agreement is essentially that which was set forth in Mr. Noone's memorandum of July 23, 1964 (DX 1778)